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No. 86-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

Of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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The Brief in Opposition inaccurately describes the role of USWA in this matter, both prior to the institution of this lawsuit and during the litigation of the merits in the lower courts. As these matters are not central to the issues raised in our petition, we address them in the margin.[1] In text, we address certain of the arguments

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[1] Respondents challenge USWA's statements that its limited intervention ended with the resolution of the "member" issue, and that USWA was not a party to the litigation on the merits (Br. Opp. 29-30). But that USWA's intervention was limited was recognized in the opinions of both courts below (App. 54a n.1, 42a). Indeed, after the "member" issue was resolved, USWA was not even

advanced by respondents that *do* bear on the issues presented.

1. *The "Member" Issue*

a. Respondents assert that they were still members of USWA, "within the Steelworker's constitutional definition of eligibility for membership," at the time this suit was filed (Br. Opp. 13). On that basis, they argue that the first and second questions are not properly presented (*Id.* 38).

Respondents' contention is, to say the least, revisionist, for respondents conceded the opposite in the district court. As that court explained, in the hearings before it "plaintiffs' counsel again and again acknowledged that plaintiffs were not members of the union at the time the complaint was filed" (App. 63a). Indeed, the court quoted the

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served with subsequent pleadings by the parties, and the district court expressly ruled at the trial on the merits that USWA was "not a party to this case" (Tr. 375), could not "participate in any argument" (Tr. 374), or "put[] on any testimony," "cross-examin[e] witness or anything else" (Tr. 404). (These rulings were made on the one occasion that USWA counsel appeared at the trial—to accompany a USWA staff representative who was called by one of the parties as a witness).

Respondents seek to impugn the quality of USWA's initial response to their allegations of misappropriation (Br. Opp. 31-33). But USWA's response—to turn the matter over to the Department of Labor for investigation—was entirely sensible (Pet. 4, 21-22). Indeed, the court below did not dispute the accuracy of USWA's evaluation that "the way it handled the matter instead of filing suit . . . [was] more beneficial to the Union" (App. 49a).

Finally, respondents suggest that USWA was uncooperative to respondents in furnishing them access to union records and witnesses during discovery (Br. Opp. 33-34). Quite the contrary, USWA voluntarily granted extensive cooperation to counsel for both sides—on an even-handed basis—in their access to union records and personnel. The cooperation extended to respondents' counsel was documented in an Appendix to USWA's opening brief to the court below (where this assertion was first made by respondents).

passages of the hearing transcript in which plaintiffs' counsel acknowledged that "clearly they were not members at [that] time" (*Id.*) Based on these concessions and on the record evidence, the district court found *as fact* that plaintiffs did not meet the Steelworkers' definition of membership at the time they filed this suit (App. 57a, 59a, 64a-65a).

In an effort to resurrect their position on this factual issue, respondents assert that the very decision with which we contend the decision below conflicts stated that the Steelworkers' Constitution treats persons in respondents' status as members (Br. Opp. 39-40, citing *Taylor v. Great Lakes Seamen's Union, Local 5000*, 701 F.2d 590, 592 (6th Cir. 1983)). That is not correct. As *Taylor* explained, 701 F.2d at 591 n.1, under the Steelworkers' Constitution persons who are laid off remain eligible for membership. And as permanently replaced strikers enjoy a legal right to be placed on a recall list, *Laidlaw Corp.*, 171 NLRB 1366 (1968), they have layoff status and thus remain members of USWA. *But all this assumes that USWA continues to serve as the exclusive bargaining representative of the employees involved.* What respondents are overlooking is that here USWA was *decertified* as the bargaining representative. Respondents may have enjoyed recall rights to their plant, but their plant no longer was within USWA's jurisdiction.

It was the decertification of USWA, not the permanent replacement of respondents, that terminated respondents' status as USWA members. As respondents' counsel told the district court, respondents remained members of USWA after they had been permanently replaced "up to the time the union was decertified" (App. 63a). And the district court found that respondents' membership status "was extinguished on the decertification of the union" (*Id.* 64a). Nothing in *Taylor* suggests a different understanding of USWA's Constitution.

b. Respondents dispute that the decision below conflicts with *Taylor*, claiming that the Sixth Circuit in

Taylor deemed "crucial" the fact that in the case before it the plaintiffs' loss of employment was the result of voluntary resignation rather than permanent replacement (Br. Opp. 40, quoting *Taylor*, 701 F.2d at 592). Respondents have mischaracterized *Taylor*. The court began by dismissing plaintiffs' contention that their position was supported by certain decisions of the Seventh Circuit, noting that in those cases the plaintiffs' loss of employment had been involuntary, and observing: "This crucial factual distinction, in our opinion, deprives the Seventh Circuit's rather broad language of any controlling weight in the controversy before us" (701 F.2d at 592). But in order to resolve the case before it, the *Taylor* court found it necessary to decide whether § 3(o) of the LMRDA is "a guarantee of continued membership" absent expulsion or suspension, and concluded that it is not (*id.*). The construction of § 3(o) in the decision below conflicts squarely with that in *Taylor*.

2. *The Attorneys Fee Issue*

a. Respondents contend (Br. Opp. 46-48) that USWA's position on the attorneys fee issue—that Congress' creation of an express, limited fee entitlement in § 501(b) precludes larger fee awards under the common benefit theory—is inconsistent with this Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973). Respondents' reliance on *Hall* is misplaced.

In *Hall*, the Court held that a union member who successfully vindicated his rights under Title I of LMRDA was not precluded by the general remedial scheme of *that* Title from an award of attorneys' fees under the common benefit exception to the American Rule. 412 U.S. at 10-13. In distinguishing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the Court in *Hall* reasoned that the remedial provision in Title I (§ 102, 29 U.S.C. § 412, which authorizes "such relief (including injunctions) as may be appropriate")

was not an express provision of remedies precluding the granting of other equitable remedies; rather, it constituted "a broad mandate" from which "we cannot fairly infer . . . an intent to deny to the courts the traditional equitable power. . . ." 412 U.S. at 10-11.

Unlike the remedial provision in Title 1, the remedial provision in Title V (§ 501(b)) constitutes not "a broad mandate" but a narrow authorization for certain forms of relief. The Court made this very point in *Hall*, by contrasting the remedial language of § 102 with the language of § 501(b), explaining that the latter "deal[s] with narrowly defined problems under the Act, and *specifically authorize*[s] . . . *limited remedies*. . . ." *Id.*, at 10 (emphasis added). The plain import of the Court's analysis is that remedial provisions such as § 501(b), which—like the provision reviewed in *Fleischmann* and *unlike* the provision at issue in *Hall*—"meticulously detail the remedies available to a plaintiff,"[2] reflect Congress' intent that only those detailed remedies are available. Thus, while the Court in *Hall* declined to apply the rationale of *Fleischmann* to Title I remedies, its language and reasoning support the applicability of *Fleischmann* in the Title V context.

The decision in *Hall* is of no help to plaintiffs for a second reason. The petitioners there argued that because Congress expressly authorized the recovery of attorneys' fees under certain Titles of the LMRDA, the failure to mention attorneys' fees in § 102—Title I's remedial provision—should be understood as denying to the courts the power to award fees in Title I actions. 412 U.S. at 10. The Court in *Hall* refused to draw such a negative inference from Congressional silence. But unlike § 102, which is silent on the subject of attorneys' fees, § 501(b) expressly provides for a precise form of attor-

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[2] *Hall v. Cole*, 412 U.S. at 10 (quoting *Fleischmann*, 386 U.S. at 719).

neys' fee relief: "a reasonable part of the recovery." The *Hall* Court's unwillingness to draw a negative inference from Congressional silence surely does not constitute authorization for judicial fee awards that conflict with this plain statutory language.

The Court in *Hall* also relied on the legislative history of § 102, finding "no suggestion anywhere in th[at] history that even a single member of Congress . . . desired the words 'such relief . . . as may be appropriate' to restrict the historic equity powers of the federal courts." 412 U.S. at 12-13. In this regard, the legislative history of § 501(b) hardly could be more divergent. As we demonstrated in the Petition (at 16), Congress clearly manifested its intention to permit fee awards in § 501(b) cases only out of the monetary recovery.

b. In an effort to find support in the legislative history for a construction of § 501(b) at variance with its plain language, respondents point to the supplemental views of five House members, contained in the House Education and Labor Committee Report on the Elliott bill, H.R. 8342. (Br. Opp. 44-46). The five members, including Congressman Elliott, stated that under the attorneys' fee language of that bill—which was identical to the language ultimately enacted as part of § 501(b)—a union member "may recover counsel fees and costs if he prevails." H.R. Rep. No. 741, 86th Cong., 1st Sess. 82 (1959). In respondents' view, this statement was "extremely important" because its authors, "key supporters of the 'realist' labor position, . . . likely carried to the floor and the conference this understanding of § 501." (Br. Opp. 45-46).

Respondents' reliance is misplaced. The supplemental views do not indicate support for a fee-shifting principle different from that stated in § 501(b). At most, the statement that a prevailing member "may recover counsel fees" is ambiguous with regard to the source and amount of the fees. And the ambiguity respecting the intentions

of the signers of the supplemental views disappears when the entirety of the legislative materials are examined. In its Section by Section Analysis of H.R. 8342 as reported, the House Committee majority (which included the five so-called "labor realists") stated that the fee provision allowed the court to "allot a reasonable part *out of any recovery*" to pay the prevailing members' attorneys' fees. H.R. Rep. No. 741, *supra*, at 45 (emphasis added). Moreover, Congressman Elliott himself explained his understanding of the attorneys' fee provision on the House floor: "the bill provides for allocation of an *appropriate part of the recovery* for counsel fees and expenses." 105 Cong. Rec. 15549 (1959) (emphasis added). In short, the House understanding of the attorney's fees language was identical to that expressed in the Senate, where the language originated: fees are to be awarded to prevailing members' counsel out of whatever monetary amount has been recovered for the union. Nothing in the floor debates or the conference report is to the contrary.

Respectfully submitted,

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